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In the Supreme Court of the United States

ELIJAH MANUEL, PETITIONER

v.

CITY OF JOLIET, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Innocence Network (the Network) respectfully submits this brief as *amicus curiae* in support of Petitioner.

The Network is an association of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, and working to redress the causes of wrongful convictions. Established in 2005, the Network's sixty-nine member organizations represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as in Canada, New Zealand and the United Kingdom.[2] The Network and its

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[1] The parties have consented to the filing of this brief (Petitioner and Respondents filed blanket consent letters with the Court). Pursuant to Supreme Court Rule 37.6, counsel affirms that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The member organizations include the Actual Innocence Clinic, After Innocence, Alaska Innocence Project, Arizona Innocence Project, Arizona Justice Project, The Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project/Post-conviction Unit, The Duke Center for Criminal Justice and Professional Responsibility, Exoneration Initiative, George C. Cochran Innocence Project, Georgia Innocence Project, Hawai`i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence Project, Innocence Project Argentina, Innocence Project London, Innocence Project at UVA School of Law, Innocence Project New Orleans,

members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of

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Innocence Project New Zealand, Innocence Project Northwest, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Texas, Irish Innocence Project at Griffith College, Italy Innocence Project, Justicia Reinvindicada, Kentucky Innocence Project, Knoops' Innocence Project (the Netherlands), Life After Innocence, Loyola Law School Project for the Innocent, Michigan Innocence Clinic, Michigan State Appellate Defender Office, Wrongful Conviction Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Minnesota Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, New Mexico Innocence and Justice Project at the University of New Mexico School of Law, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Reinvestigation Project, Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Taiwan Association for Innocence, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law (Canada), University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Western Michigan University Cooley Law School Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic at Indiana University School of Law.

the criminal justice system and to ensure that future wrongful convictions are prevented.

Amicus has a unique perspective on the question presented in this case. The Network's member organizations have represented hundreds of clients who were wrongfully convicted, many due to pre-arrest misconduct on the part of law enforcement. In these cases, coerced confessions, intimidation of witnesses, use of suggestive photo arrays and lineups, and outright fabrication of forensic statistics caused innocent people to be seized without probable cause. As the stories of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, and Michael Saunders illustrate, the ordeals faced by many of those who have been wrongfully convicted often begins with a tainted determination of probable cause.

The Fourth Amendment is especially well-suited to ground § 1983 claims by exonerees seeking redress for the liberty deprivations they have suffered as a result of extended pre-trial detention on the basis of tainted determinations of probable cause. Malicious prosecution actions based on the Fourth Amendment allow exonerees to recover damages from the point of their initial detention without probable cause until the ultimate termination of the underlying criminal prosecution. Fourth Amendment malicious prosecution plaintiffs also benefit from a favorable statute of limitations, which accrues only upon the ultimate termination of the underlying prosecution in the plaintiff's favor. And unlike claims based only in the procedural due process protection of the Fourteenth Amendment, a Fourth Amendment malicious prosecution claim

provides the wrongfully convicted access to a federal Constitutional damages remedy even when a state remedy is available.

The availability of a Fourth Amendment remedy also ensures that state officials are aware of, and comply with, their Constitutional obligations. Should this Court confirm the existence of a malicious prosecution claim based on the Fourth Amendment, the litigation of such § 1983 actions would allow lower courts to further articulate the boundaries of permissible police conduct. In the long run, such precedents would discourage the use of law enforcement tactics that undermine the investigative and adversarial processes and contribute to wrongful convictions.

Given our clients' experiences, *amicus* strongly supports Petitioner's position that state and local officials who perpetrate seizures without probable cause violate the Fourth Amendment and may be held personally liable under 42 U.S.C. § 1983, and offers the narratives of five exonerees to illustrate the human dimension of the question before the Court.

SUMMARY OF ARGUMENT

This case squarely raises the question whether a malicious prosecution action based on the Fourth Amendment is cognizable under § 1983. The vast majority of the United States Courts of Appeals have so concluded. The lone holdout is the Seventh Circuit, which maintains that federal claims of malicious prosecution are founded on the right of

due process only, and are therefore available only when a state remedy is not.

The effects of such a restrictive rule are borne by the many clients of the Network's member organizations who have been convicted of crimes they did not commit. The ordeal of many of these exonerees began with a detention based on a tainted determination of probable cause. However, under the Seventh Circuit's approach, no person who has been wrongfully detained on less than probable cause as a result of police misconduct may obtain a Fourth Amendment malicious prosecution remedy using § 1983, except in the circumstance where a state tort remedy is not available.

In other words, if City of Joliet police officers had fabricated the evidence, tainted the identifications, and coerced the confessions that contributed to the wrongful convictions of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, Michael Saunders—and the countless others like them—the Seventh Circuit would shield the officers' conduct from any liability in a § 1983 malicious prosecution suit based on the Fourth Amendment.

In view of the devastating effects that follow from such police misconduct, *amicus* urges the Court to confirm the availability of a Fourth Amendment remedy for victims of malicious prosecution.

ARGUMENT

I. A FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM IS A VIABLE CONSTITUTIONAL TORT COGNIZABLE UNDER § 1983

A. This Court's Precedent Establishes that Malicious Prosecution is Actionable as a Fourth Amendment § 1983 Claim

For over forty years, this Court has held that the Fourth Amendment protection against unfounded invasions of liberty and privacy requires a judicial determination of probable cause for any extended detention related to potential or actual criminal charges. *Gerstein v. Pugh*, 420 U.S. 103, 112-14 (1975). The Court long ago determined that the existence of probable cause should be decided by a neutral and detached magistrate, and not by law enforcement officials engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). While the Court has expressed a preference for a determination of probable cause prior to arrest through the use of arrest warrants, law enforcement officials may also seek to persuade a magistrate within fourty-eight hours of an arrest that probable cause supports continued detention. *Gerstein v. Pugh*, 420 U.S. 113-14; *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Wong Sun v. United States*, 371 U.S. 471, 479-482 (1963).

Where an individual is detained pursuant to an arrest warrant obtained as a result of police misconduct, the detention violates the Fourth Amendment and the officers who obtained that warrant can be held liable under 42 U.S.C. § 1983. *See Malley v. Briggs*, 475 U.S. 335 (1986). Likewise, five Justices of the Court confirmed in *Albright v. Oliver*, 510 U.S. 266 (1994), that the Fourth Amendment continues to apply when a person is wrongfully detained following a post-arrest determination of probable cause tainted by misleading officer testimony. *Id.* at 274-75 (plurality opinion); *id.* at 286 (Souter J., concurring in judgment).

B. Nine Courts of Appeals Have Recognized Federal Malicious Prosecution Claims under the Fourth Amendment

The vast majority of the United States Courts of Appeals have concluded that a malicious prosecution action based on the Fourth Amendment is cognizable under § 1983. *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 94, 105 (1st Cir. 2013) ("an individual's Fourth Amendment right to be free from seizure but upon probable cause continues through the pretrial period, and that, in certain circumstances, injured parties can vindicate that right through a § 1983" action); *Manganiello v. City of New York*, 612 F.3d 149, 160-161 (2d Cir. 2010) (holding that "In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment and must establish the

elements of a malicious prosecution claim under state law ") (citations omitted); *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3rd Cir. 2009) (holding that a Fourth Amendment § 1983 malicious prosecution claim lies where the plaintiff can show, among others, that she "suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding"); *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("A 'malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort.'"); *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) ("The Sixth Circuit 'recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment,' which 'encompasses wrongful investigation, prosecution, conviction, and incarceration.'"); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th. Cir. 2004) ("[W]e have held, post-*Albright*, that a § 1983 malicious prosecution plaintiff must prove that the defendants acted for the purpose of depriving him of a 'specific constitutional right,' but have not limited that right to one protected by the Fourth Amendment.") (citation omitted); *Becker v. Kroll*, 494 F.3d 904 914 (10th Cir. 2007) ("We have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be 'the Fourth Amendment's right to be free from unreasonable seizures.'"); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010) ("This Circuit 'has identified malicious prosecution as a violation of the Fourth Amendment and a viable constitutional tort

cognizable under § 1983.'"); *Pitt v. District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007) ("We join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably "seized" without probable cause, in violation of the Fourth Amendment.").

These Courts of Appeals have correctly recognized that the range of police misconduct that can undermine the neutral determination of probable cause should be actionable in a Fourth Amendment malicious prosecution claim. The courts have identified the following police misconduct as subject to liability:

- the use of a witness whom an officer knows to be untruthful to procure an indictment (*Manganiello v. City of New York*, 612 F.3d at 160-163)
- the inclusion by police of a false identification resulting from a tainted photo array in a warrant affidavit (*Hernandez-Cuevas v. Taylor*, 723 F.3d at 105);
- lying to or misleading the prosecutor, failing to disclose exculpatory evidence to the prosecutor, or unduly pressuring the prosecutor to seek an indictment (*Evans v. Chalmers*, 703 F.3d at 647-648);
- making false or misleading statements and omitting material information from

a warrant application (*Sykes v. Anderson*, 625 F.3d at 306-308);

- coercing false statements (*Wilkins v. DeReyes*, 528 F.3d 790, 802 (10th Cir. 2008));
- fabricating evidence (*Grider v. City of Auburn*, 618 F.3d at 1258); and
- initiating criminal proceedings causing the detention of a person despite the absence of eyewitness identifications or other reliable evidence (*Pitt v. District of Columbia*, 491 F.3d at 511).

The Fifth and Eighth Circuits have not yet conclusively extended Fourth Amendment relief to the maliciously prosecuted. *See e.g. Castellano v. Fragozo*, 352 F.3d 939, 953-954 (5th Cir. 2003) ("[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983."); *Harrington v. City of Council Bluffs*, 678 F.3d 676, 680-81 (8th Cir. 2012) ("Assuming a Fourth Amendment right against malicious prosecution exists, such a right was not clearly established when the appellees were prosecuted in 1977 and 1978.").

Nevertheless, neither the Fifth nor the Eighth Circuit has adopted the restrictive approach currently favored by the Seventh Circuit. After this

Court's decision in *Albright*, the Seventh Circuit initially accepted that an individual subjected to extended detention on less than probable cause could pursue a § 1983 malicious prosecution claim founded on the Fourth Amendment. *See Smart v. Bd. Of Trs. Of Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994). Six years later, however, the Seventh Circuit reversed itself, adopting an interpretation of *Albright* that limits the constitutional protection from prosecution without probable cause to the purview of due process. *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). Accordingly, the Seventh Circuit now maintains that no malicious prosecution claim exists under the federal Constitution unless no state law remedy is available.

It was on this basis that the court below affirmed the District Court's dismissal of Petitioner's § 1983 complaint against the City of Joliet and several of its police officers. *Manuel v. City of Joliet*, 590 F. 641, 642 (7th Cir. 2015).

II. THE CURRENT SEVENTH CIRCUIT APPROACH UNDULY RESTRICTS THE AVAILABILITY OF FOURTH AMENDMENT RELIEF

A. A Fourth Amendment § 1983 Malicious Prosecution Cause of Action is An Important Remedy for the Wrongfully Convicted

Courts have long recognized the "medley of harms" inflicted by subjecting individuals to baseless prosecution. *Albright v. Oliver*, 975 F.2d 343, at 345

(7th Cir. 1992), *aff'd* 510 U.S. 1215 (1994). When police obtain a search warrant or a determination of probable cause after a warrantless arrest on the basis of fabricated or coerced evidence, the targeted individual suffers a range of liberty deprivations that engage Fourth Amendment protection. First and foremost are the effects of being "thrown into jail to await trial." *Albright v. Oliver*, 975 F.2d at 346. The devastating effect of incarceration on the person who is seized as well as on his or her family and community is well-documented. *See e.g.* Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 Harv. C.R.-C.L. L. Rev. 257, 262 (2013) (noting that the formerly incarcerated suffer psychological trauma "in some ways similar to repatriated prisoners of war"); Thomas F. Geraghty, *Prisons and after Prison*, 94 J. Crim. L. & Criminology 1149, 1159 (2004) (reviewing John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003), *et al.*) ("If the devastating impact of imprisonment on prisoners, as it is practiced in the United States, is not enough, existing practices regarding prisoner contact with the outside world ensure that the tragedy of incarceration will have ripple effects on families and on communities."); Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 Fordham Urb. L.J. 1551, 1552-53 (2003) (noting that incarceration "can adversely affect the ability of returning prisoners to re-enter labor markets," "often disrupts family ties and social networks," "potentially stigmatizes neighborhoods, complicating the ability of residents to...compete in labor markets," and "may transform into an intrinsic

part of the ecological dynamics of neighborhoods that may actually elevate crime within neighborhoods").

Racial minorities, the poor, and the uneducated disproportionately suffer the effects of incarceration. Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 Annals Am. Acad. Pol. & Soc. Sci. 221, 231 (2009) ("For black male dropouts born since the mid-1960s, 60 to 70 percent go to prison," which "has become a routine life event on the pathway through adulthood."); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. Davis L. Rev. 1005, 1009 (2001) (explaining that "[h]igh incarceration rates among Black adults (and an increasing number of juvenile offenders) and detention rates among Black children" disproportionately disrupt black families, including through "the disproportionate removal of Black children from their parents' custody to state control"); John Tierny, *Prison and the Poverty Trap*, N.Y Times, Feb. 18, 2013, http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html (noting that "[a]mong African-Americans who have grown up during the era of mass incarceration, one in four has had a parent locked up" and "[f]or black men in their 20s and early 30s without a high school diploma, the incarceration rate is so high – nearly 40 percent nationwide – that they're more likely to be behind bars than to have a job").

Individuals detained on less than probable cause but released before trial also face deprivations that warrant Fourth Amendment protection. A person facing baseless criminal charges is "required

to appear in court at the state's command," is often subject "to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction," "may suffer reputational harm," and "will experience the financial and emotional strain of preparing a defense." *Albright v. Oliver*, 510 U.S. at 278 (Ginsburg J. concurring). As Justice Ginsburg and others have concluded, a defendant released pretrial remains "effectively 'seized' for trial so long as the prosecution against him remain[s] pending." *Id.* at 279-80; *Murphy v. Lynn*, 118 F.3d 938, 945 (2nd Cir. 1997) (holding that plaintiff was seized under the Fourth Amendment when ordered not to leave the state and required to attend court); *Gallo v. City of Philadelphia*, 161 F.3d 217, 223-25 (3d Cir. 1998) (holding that plaintiff was seized when subjected to travel restrictions and required to contact pretrial services weekly); *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (holding that a summons coupled with a bond and travel restrictions may constitute a seizure).

A determination of probable cause tainted by police misconduct also has ripple effects. The wrongfully arrested and charged—many of whom are poor, uneducated, or otherwise vulnerable to coercive state conduct—face an unfair choice: fight a case whose adjudication has been corrupted by malicious law enforcement tactics, or seek to escape seizure by agreeing to a favorable plea. In this context, it is worth recalling that only approximately five percent of all state felony criminal prosecutions go to trial, and that plea bargains account for nearly

ninety-five percent of all criminal convictions. *Padilla v. Kentucky*, 559 U.S. 356, 372 n.13 (2010) (citing Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2003*, p. 418 (31st ed. 2005). Police misconduct that corrupts the initial seizure might also undermine the investigative and adjudicative processes that follow. For example, the suppression of exculpatory evidence by police may be the first in a chain of events that "effectively short-circuit[s] the adversarial process" altogether. Sean O'Brien, *Presumed Guilty: Innocence and the Death Penalty*, 2007 J. Inst. Just. Int'l Stud. 14, 18. Indeed, in the Network's experience, wrongful convictions are often the result of multiple factors. *See e.g.* Mid-Atlantic Innocence Project profile of Kirk Bloodsworth, http://www.exonerate.org/other-local-victories/kirk-bloodsworth/ (last visited May 4, 2016).

The ordeals faced by the many clients of the Network's member organizations who were wrongfully convicted often began with a tainted determination of probable cause. As explained below, police misconduct denied each of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, and Michael Saunders a neutral determination of probable cause. In these cases, pre-arrest police tactics—coerced confessions, intimidation of witnesses, use of suggestive photo arrays and lineups, and outright fabrication of forensic statistics—caused innocent people to be unlawfully seized and detained. Each was eventually convicted of crimes they never committed, and together, Gray, Rose, Anderson, Bromgard, and

Saunders together served *seventy-nine years* in prison.

B. Paula Gray[3]

In 1978, Paula Gray was wrongfully convicted of murder, rape, and perjury. Police officers had forced her to confess to the crimes by threatening her with imprisonment, rape, and death, and through other forms of intimidation and physical force. Ms. Gray was not yet an adult at the time and had the mental capacity of a much younger child. Ms. Gray's coerced confession was used to charge her and four other men. She served 24 years in prison as a result. Ms. Gray's conviction was eventually thrown out after the police officers' actions came to light.

Paula Gray grew up in Chicago Heights with her mother, four sisters, and two brothers. At the age of 6, her IQ was measured at 57, classifying her as "mentally retarded." *People v. Jimerson*, 166 Ill. 2d 211, 218 (1995). In the spring of 1978, when Ms. Gray was 17, she was unable to read, write, or tell time. *Id.* at 219.

On Friday, May 12 1978, plainclothes police officers came to Ms. Gray's home and took her "to the police station or Sherrif's jail." Unbeknownst to Ms. Gray, a young man and woman had been

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[3] Unless otherwise noted, the facts of Ms. Gray's case are taken from the Opinion of Circuit Court Judge William D. O'Neal, July, 2001 (vacating conviction), unreported but available at http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/paula-gray.html. That opinion is over 300 pages long and is not paginated.

abducted from a gas station: the woman had been raped, and the couple then murdered.

The police asked Ms. Gray what she knew about the crimes. She responded that she didn't know anything. The police accused her of lying. They called her a "bitch[]," "slut[]," and "whore[]." One officer grabbed her wrist, kept squeezing it and wouldn't let it go, even though she told him he was hurting her. Another flicked his finger on her head.

The officers wanted Ms. Gray to implicate herself. They told her to say that she held a lighter while four men took turns raping the woman, and then killed the woman and the young man she was with. Officers told Ms. Gray she would go to prison for life if she did not adopt the story they had fabricated. The police also told her that she "would never see her family again," and that "what happened to the woman," meaning the female victim who was raped and murdered, "would happen to her."

Later the next day, officers took Ms. Gray to an abandoned building where the young couple had been murdered. Officers walked her through the crime scene, explaining the version of events they wanted her to adopt as her own. Ms. Gray would later testify that she thought the police were going to kill her. At no point did the police recite Ms. Gray her *Miranda* rights, nor did she waive them.

Soon thereafter, Ms. Gray testified before a grand jury, retelling the story that the police had instructed her to tell.

Approximately a month later, Ms. Gray testified at a preliminary hearing, at which time she

recanted her statement to the grand jury and denied all knowledge of the crimes. *People v. Jimerson*, 166 Ill. 2d at 213. Upon her recantation, Ms. Gray was charged for the rape and murders along with perjury. She was incarcerated upon being charged. While in a detention facility during her trial, Ms. Gray was watched by a Sheriff's policeman who gave her no privacy despite her repeated requests, and who on one occasion unlocked her cell, came in, and kissed her. When she returned to the County Jail, Ms. Gray was raped in her cell by four inmates after returning from showering.[4]

Ms. Gray was convicted of murder, rape, and perjury, and sentenced to concurrent terms of fifty years' imprisonment for each murder, fifty years for rape, and ten years for perjury.

Three other men ultimately confessed to the crimes, and their guilt was later confirmed by DNA testing. The officers' coercion of Paula Gray's false confession was discovered during a later civil rights suit. Ms. Gray's conviction was eventually thrown out in 2001.

All told, Ms. Gray spent twenty-four years in jail as a result of state misconduct, and it would be about thirty-four years before she was granted a pardon based on her innocence.

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[4] It is unclear from Circuit Court Judge O'Neal's opinion when, precisely, Paula Gray was raped.

C. Peter Rose[5]

In 1995, Peter Rose was wrongfully convicted of rape, kidnapping, and forced oral copulation. Police pressured a young girl to identify Mr. Rose as the man who had attacked her, despite the fact that she could not identify Mr. Rose in a photo lineup. Mr. Rose was arrested, charged, and convicted. He would serve ten years in prison before being exonerated on the basis of DNA evidence.

On November 29, 1994, a thirteen-year-old girl was attacked while walking to school in California. She said a man had punched her in the face and dragged her into an alley where he raped her from behind. After the man fled, the girl flagged down a passing car and told the driver she had been raped and asked for a ride home. As they drove off, the girl pointed at a man walking on the street and said, "There he is!"

Police prepared a photographic lineup containing a photo of Mr. Rose and showed it to the victim and the driver of the car. Neither picked out Mr. Rose.

Over the next three weeks, no suspect was charged. It was then that police started to pressure the victim to identify Mr. Rose. Two detectives brought the young girl to a small room in the basement of the police station. In an interview that

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[5] Unless otherwise indicated, the facts of Mr. Rose's story are taken from Susan Rutberg, *Anatomy of a Miscarriage of Justice: The Wrongful Conviction of Peter J. Rose*, 37 Golden Gate U. L. Rev. 7 (2006).

would last over three hours, the victim insisted she did not know who attacked her. The two detectives, both men, repeatedly accused the victim of lying. They quizzed her about her story over and over in an effort to find inconsistencies. The police proceeded to scorn the victim's belief in God, asked her to swear on her grandfather's life, asked her demeaning questions about her body, accused the young victim of prostitution and gang affiliation, and threatened to tell her grandfather that she had been sexually active, all while calling her a liar. Only then did the victim hesitantly mention Mr. Rose.[6]

At the end of the interview, the detectives again showed the victim a photo spread that included Mr. Rose's picture. This time she selected his photo. Mr. Rose was arrested the next day.

Despite having repeatedly told police that she could not identify her attacker—and her refusal to pick Mr. Rose out of the first photo lineup—the victim became certain of her identification of Mr. Rose by the time she testified at the preliminary hearing several weeks later. She would repeat that she was certain of her identification of Mr. Rose again at trial.

Mr. Rose was eventually convicted and sentenced to twenty-seven years in prison. He was exonerated ten years later on the basis of a DNA test that excluded him as the rapist.

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[6] Rutberg at 11-12 (citing Transcript of Police Interview with Victim at 37-38, *People v. Rose*, L.P.D. 94-14431 (Cal. Dec. 20, 1994)) (emphasis removed).

D. Marvin Anderson[7]

Marvin Anderson was convicted in 1982 of a rape he did not commit and sentenced to 210 years in prison. He was singled out as a suspect because he was the only black man in the community in rural Virginia that the police knew to have a white girlfriend. Mr. Anderson was then the subject of a suggestive photo array and a suggestive lineup, after which the victim identified him as her attacker. He was convicted entirely on the basis of this identification. After fifteen years in prison and four years on parole, Mr. Anderson was eventually exonerated after DNA testing excluded him as the perpetrator.

On July 17, 1982, a young woman was raped by a black man who was a total stranger to her. The victim told police that her assailant said he "had a white girl." Marvin Anderson, then an eighteen-year-old with no criminal record, was the only black man the investigating officer knew who lived with a white woman. Because of this fact, the police zeroed in on Mr. Anderson.

Mr. Anderson had no criminal record, so the officer went to Mr. Anderson's employer to obtain a picture of him. Mr. Anderson's employment photo-identification card included a color photo. The

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[7] Unless otherwise indicated, the facts of Mr. Anderson's story are taken from Francis X. Clines, *DNA Clears Virginia Man of 1982 Assault*, N.Y. Times, Dec. 10, 2001, http://www.nytimes.com/2001/12/10/national/10DNA.html and the Mid-Atlantic Innocence Project profile of Marvin Anderson, http://www.exonerate.org/maip-victories/marvin-anderson (last visited May 3, 2016).

victim was presented with a photo lineup of standard black-and-white police photographs of criminals, except for the color employment identification photograph of Mr. Anderson. The victim identified Mr. Anderson as her assailant.

Within an hour of the photo lineup, the victim was asked to identify her assailant from at an actual lineup. Mr. Anderson was the only person in the lineup whose picture had been in the original photo array shown to the victim. The victim identified him in the lineup as well, despite the fact that Mr. Anderson differed from significantly from the victim's initial description of her attacker. Several alibi witnesses also placed Mr. Anderson at home at the time of the crime.

At trial, prosecutors relied entirely on the victim's identification of Mr. Anderson. He was convicted by an all-white jury and sentenced to 210 years in prison.

Mr. Anderson spent fifteen years in prison and four years on parole before DNA testing excluded him as the perpetrator.

E. Jimmy Ray Bromgard[8]

In late 1987, Jimmy Ray Bromgard was convicted of a sexual assault he did not commit and was sentenced to forty years to life in prison. Mr. Bromgard was arrested after the state crime laboratory matched his hairs to samples found at the

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[8] Unless otherwise indicated, the facts of Mr. Rose's story are taken from *State v. Bromgard*, 261 Mont. 291, 292-93 (Sup. Ct. Mont. 1993).

crime scene on the basis of junk science. The forensic scientist who declared the match was fabricating frequencies and probabilities. Mr. Bromgard served fifteen years in prison before he was eventually exonerated by DNA testing.

In the early morning hours of March 20, 1987, an intruder raped an eight-year-old girl. Based on the victim's description, the police created a composite sketch of the assailant. Seeing the sketch, another officer mentioned that he thought it looked like eighteen-year-old Jimmy Ray Bromgard. A neighbor who saw the sketch said the same.

Mr. Bromgard agreed to submit head and pubic hair samples. The State Crime Laboratory found Mr. Bromgard's hairs to be "indistinguishable from certain samples recovered from the victim's bedding." *State v. Bromgard*, 261 Mont. at 293. Mr. Bromgard was arrested, charged, and tried on three counts of sexual intercourse without consent.

Arnold Melnikoff, the forensic scientist who had reported that Mr. Bromgard's hairs tied him to the crime scene, testified that head and pubic hairs found at the scene of the rape were indistinguishable from those of Mr. Bromgard. Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. Times. Dec. 19, 2002, http://www.nytimes.com/2002/12/19/us/2-states-to-review-lab-work-of-expert-who-erred-on-id.html. Melnikoff further testified that the probability that either set of hairs found at the scene of the crime were not those of Mr. Bromgard were "1 in 100." *Id.* Because head and public hairs look different, he testified, "it's a multiplying effect, it would be 1

chance in 10,000." *Id.* A jury found Mr. Bromgard guilty of all three counts.

Little other evidence beyond Melnikoff's testimony was presented at Mr. Bromgard's trial. Indeed, in a television interview years later, the prosecutor in Mr. Bromgard's case stated that "without Melnikoff's hair report and testimony about the numbers, [he] would not have even filed an information charging Mr. Bromgard with the crimes." Transcript of Deposition of Mike McGrath, at 234:5-10, *Bromgard* v. *State*, CV-05-32-BLG-RWA (D. Mont. Sept. 29, 2006), http://netk.net.au/Montana/McGrathDeposition.pdf (last visited May 5, 2016).

The problem with the hair analysis used as the basis to charge Mr. Bromgard is that "no adequate empirical data exist regarding the frequency of microscopic characteristics of human hairs." Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 19 (2009). In other words, when Melnikoff testified that there was a "1 in 10,000" chance that the hairs from the crime scene could have come from someone other than Mr. Bromgard, "those frequency statistics were simply made up by the analyst." *Id.* As one peer review report of Mr. Bromgard's case said, "there is not—and never was—a well established probability theory for hair comparison." Richard E. Bisbing et al., *Peer Review Report: Montana v. Jimmy Ray Bromgard*, at 2, http://www.law.virginia.edu/pdf/faculty/garrett/innocence/peer_review_report.pdf.

It was later discovered that Melnikoff's fabricated frequencies and probabilities were used to wrongfully charge and convict at least three other innocent men. Melnikoff was the director of Montana's State Crime Laboratory for almost two decades, and worked as a forensic scientist for the Washington State Police for over a decade. Liptak, *supra*.

Mr. Bromgard served fifteen years in prison before he was exonerated by DNA testing.

F. Michael Saunders[9]

In 1997, Michael Saunders was sentenced to forty years in prison for a rape and murder he did not commit. Police coerced false confessions from a number of young men by threatening violence and feeding them the supposed details of the crime. Eventually, Mr. Saunders was named. The police used physical violence to coerce Mr. Saunders into signing a pre-drafted confession. Mr. Saunders would serve 15 years in prison before he was exonerated by DNA testing.

On November 7, 1994, the body of Nina Glover was found in the Englewood neighborhood of Chicago's south side. She had been raped and murdered.

With the investigation going nowhere, officers arrested an eighteen-year-old by the name of Jerry

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[9] Unless otherwise indicated, the facts of Mr. Saunders' story are taken from *Saunders v. City of Chicago*, 2015 WL 4765424 (N.D. Ill. Aug. 12, 2015).

Fincher. Police threatened Fincher with violence and fed him details of the crime. Over the course of two days, Fincher gave an evolving series of statements. The officers eventually coerced Fincher into giving a false statement to the Assistant State's Attorney (ASA), who participated in the interrogation. Fincher's coerced statement falsely implicated himself and four other teenagers from the neighborhood, including Michael Saunders.

The police then arrested sixteen-year-old Harold Richardson as well as Terrill Swift. Swift was coerced into confessing and falsely implicating Richardson and Mr. Saunders. After hours of "improper coercion and false promises of leniency," the officers also coerced a false confession from Richardson, which implicated Thames and Mr. Saunders. *Saunders v City of Chicago*, at *2.

Finally, the police arrested and interrogated Mr. Saunders, who was then fifteen years old. The officers never advised Mr. Saunders of his rights, and refused to act on his requests for a lawyer and to call his mother. Officers used physical violence and threats to try to coerce Mr. Saunders into giving a false confession. Another ASA fabricated a written statement that was attributed to Mr. Saunders implicating himself and the other teenagers in the rape and murder. Under pressure, Mr. Saunders signed this statement without reading it and initialed "corrections" within the document that police and prosecutors falsely attributed to Mr. Saunders. *Id.*

Mr. Saunders was convicted after a bench trial in 1997. The presiding judge said that the

whole case against Mr. Saunders came down to his confession, and that without it, there was no case. *Id.* at 5. Mr. Saunders was sentenced to forty years in prison.

Fourteen years later, in 2011, DNA testing returned a match to another man. Mr. Saunders' conviction was vacated, and he was granted a Certificate of Innocence in 2012 over the State's Attorney's objections.

III. THE COURT SHOULD PROVIDE VICTIMS OF MALICIOUS PROSECUTION A FOURTH AMENDMENT REMEDY

The Fourth Amendment is especially well-suited to ground § 1983 claims by exonerees seeking redress for extended pre-trial detention on the basis of determinations of probable cause tainted by police misconduct. As the plurality opinion in *Albright* noted, "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it....We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Albright v. Oliver*, 510 U.S. at 274 (citing *Gerstein v. Pugh*, 420 U.S. at 114). The availability of a Fourth Amendment remedy therefore ensures that law enforcement officials are aware of, and comply with, their Constitutional obligations. As one scholar of criminal procedure has noted, "[t]he central issue in modern Fourth Amendment doctrine is the degree to which it is possible and/or desirable to constrain discretionary police authority by a regime of rules." Thomas Y.

Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 747 (1999). Should this Court confirm the existence of a malicious prosecution claim based on the Fourth Amendment, the litigation of such § 1983 actions would allow lower courts to further articulate the boundaries of permissible police conduct. In the long run, such precedents would help disincentivize the use of law enforcement tactics that contribute to wrongful convictions.

Malicious prosecution actions based on the Fourth Amendment offer redress to such exonerees that other § 1983 actions do not, including the availability of damages from the point a person has been initially detained without probable cause until the ultimate termination of the underlying criminal prosecution. John R. Williams, *Beyond Police Misconduct and False Arrest: Expanding the Scope of 42 U.S.C. § 1983 Litigation*, 8 Suffolk J. Trial & App. Adv. 39, 42-43 (2003); *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Fourth Amendment malicious prosecution plaintiffs also benefit from a more favorable statute of limitations—whereas other constitutional claims, including claims for false arrest, accrue from the date of the initial arrest, a malicious prosecution action accrues only upon the ultimate termination of the underlying prosecution in the plaintiff's favor. *Albright v. Oliver*, 510 U.S. at 280 (Ginsburg J.); see also *Albright v. Oliver*, 975 F.2d at 345. And an approach that restricts federal malicious prosecution claims to the procedural due process protection of the Fourteenth Amendment—such as that applied by the Seventh Circuit below—risks denying the wrongfully convicted access to a

federal Constitutional damages remedy except in the very few instances where a state refuses one. *See e.g. Newsome v. McCabe*, 256 F. 3d at 750-51; *Pierce v. Gilchrist*, 359 F.3d 1279, 1288 (10th Cir. 2004); Martin A. Schwartz & Kathryn R. Urbonya, *Section 1983 Litigation*, Federal Judicial Center, at 35 (2d ed. 2008).

If the Seventh Circuit's approach is adopted by this Court, no person who has been wrongfully detained on less than probable cause as a result of police misconduct could obtain a Fourth Amendment malicious prosecution remedy, except in the circumstance where no state tort remedy is available. More concretely, if City of Joliet police officers had fabricated the evidence, tainted the identifications, and coerced the confessions that contributed to the wrongful convictions of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, and Michael Saunders, the Seventh Circuit would shield the officers' conduct from any liability in a § 1983 Fourth Amendment malicious prosecution suit.

Those incarcerated as a result of police misconduct that undermines the neutral determination of probable cause suffer extensive harm. The mere fact of incarceration subjects the wrongfully prosecuted and their families to unnecessary psychological, economic, and social injury. Racial minorities, the poor, and the uneducated disproportionately suffer these effects. Individuals detained on less than probable cause but released before trial also face liberty restrictions, including the restricted ability to travel as well as

the prospect of emotional, financial, and reputational ruin.

In view of its extensive experience representing the wrongfully convicted, the Network respectfully submits that those who have been denied a neutral determination of probable cause by police misconduct should have access to a Fourth Amendment malicious prosecution remedy.

CONCLUSION

For the foregoing reasons, and those presented by Petitioner, the judgment should be reversed.

Respectfully submitted,

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